

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 16, 2010 Session

BONNIE FAIN v. STATE OF TENNESSEE

Appeal from the Circuit Court for Marion County
No. 8020A Thomas W. Graham, Judge

No. M2009-01148-CCA-R3-PC - Filed March 9, 2010

Based on the limited record before us, it appears that the Petitioner, Bonnie Fain, was charged with one count of felony assault and one count of felony child abuse. She pleaded guilty to one count of misdemeanor assault and one count of misdemeanor child abuse. She filed a petition for post-conviction relief, alleging that she received ineffective assistance of counsel due to her trial counsel's failure to discuss the possibility of making an "as applied" challenge to our assault statute, Tennessee Code Annotated section 39-13-301, as violative of her right to privacy under the Federal and Tennessee constitutions by criminalizing corporal punishment of a child. After an April 17 and 21, 2009 hearing on her post-conviction petition, the Circuit Court of Marion County denied the Petitioner relief. After our review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Norman Lipton, South Pittsburg, Tennessee, for the appellant, Bonnie Fain.

Robert E. Cooper, Jr., Attorney General and Reporter; Lindsay Paduch Stempel, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Julia Oliver, Assistant District Attorney General, for the appellee, State of Tennessee

OPINION

Factual Background

The record does not contain a recitation of the factual basis underlying the Petitioner's guilty plea; it appears from comments at the post-conviction hearing that the Petitioner was charged based on allegations that she had held her adopted son's tongue with a pair of pliers and submerged his head in ice water. The Petitioner argues that the attorney who represented her during her guilty plea proceedings was ineffective because he did not advise her to challenge the constitutionality of the assault statute as applied to the Petitioner.

Alan Beard ("trial counsel") was retained to represent the Petitioner at trial and testified for the State at her post-conviction hearing. He said he thoroughly investigated and prepared himself to try the Petitioner's case if necessary. Given the strength of the State's case, however, he was convinced that a conviction was unavoidable. He noted that the Petitioner's "job was a major concern, so [his] major goal was to get the felonies off the table if possible." The State allowed him to do so, instead offering the Petitioner the opportunity to plead guilty to misdemeanors.

At some point, the Petitioner had trouble paying trial counsel. In order to ensure that the Petitioner would receive impartial representation, trial counsel asked another lawyer, Jes Beard, to assist him with the Petitioner's case. Trial counsel noted that he did not "consider[] raising any constitutionality of the statute" issue because he felt it was a weak argument and that the Petitioner's case was not a good "test case" because the extreme conduct alleged went beyond normal corporal punishment. Trial counsel said that the Petitioner, as far as he could discern, understood her options and chose to plead guilty of her own volition.

Don Fain, the Petitioner's husband, testified at the post-conviction hearing on the Petitioner's behalf. He generally discussed her loving and charitable nature, including her decision to take the victim into her home, feed him, clothe him, and educate him. Mr. Fain denied that the Petitioner abused the victim and said the Petitioner would not have pleaded guilty if trial counsel had not "misread" the law to her.

The post-conviction court denied relief. The Petitioner now appeals.

Analysis

The Petitioner contends that trial counsel was ineffective due to his failure to discuss the possibility of arguing that Tennessee's assault statute is unconstitutional as applied to her because it would criminalize the corporal punishment of her child, which she argues is protected by both the Federal and Tennessee constitutions. To sustain a petition for post-

conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the petitioner “must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing

court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

The constitutionality of Tennessee Code Annotated section 39-13-301 is not before this Court. The Petitioner's conviction for assault was predicated upon her plea of guilty. A transcript of the guilty plea hearing is not in the record. In order to receive post-conviction relief, the Petitioner must demonstrate that trial counsel was deficient in failing to raise the issue of the statute's constitutionality, that she would not have pleaded guilty had he raised that issue, and that she was prejudiced by trial counsel's failure because she would eventually have prevailed on the issue's merits had she proceeded to trial.

In our view, the post-conviction court did not err by denying relief. We need not decide whether trial counsel performed deficiently or whether the Petitioner would have ultimately prevailed on the constitutional issue's merits. The Petitioner did not testify at her post-conviction hearing. No other witness offered testimony that her decision to plead guilty was predicated on a lack of discussion of the assault statute's constitutionality. The burden is on the Petitioner to prove her factual allegations by clear and convincing evidence. The record simply contains no evidence supporting the proposition that the Petitioner would have proceeded to trial had trial counsel suggested a constitutional attack on Tennessee Code Annotated section 39-13-301. The Petitioner did not establish that she is entitled to post-conviction relief.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgment of the post-conviction court.

DAVID H. WELLES, JUDGE